

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD RANKIN ARMSTRONG,

Defendant-Appellant.

UNPUBLISHED

January 18, 2011

No. 291979

Otsego Circuit Court

LC No. 2005-003403-FH

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Defendant appeals an order of the trial court denying his motion for a new trial based on allegations that his trial counsel provided ineffective assistance.¹ This Court previously denied defendant's delayed application for leave to appeal the issue, but the Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as if on leave granted. *People v Armstrong*, 485 Mich 1132; 780 NW2d 291 (2010). We affirm.

On appeal, defendant argues that he is entitled to a new trial because defense counsel rendered constitutionally ineffective assistance by failing to have defendant's cell phone billing statement admitted into evidence. We disagree.

Whether a defendant has been denied effective assistance of counsel involves mixed questions of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error. *Id.* We review issues of constitutional law de novo. *Id.* A trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). An abuse of discretion occurs when the trial court's ruling falls outside the principled range of outcomes. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

¹ Defendant was convicted by a jury of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim between ages 13 and 16), and was sentenced to concurrent terms of 7 to 15 years' imprisonment.

To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy a two-pronged test. First, a defendant must show that counsel's performance "fell below an objective standard of reasonableness." *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). As to matters of trial strategy, defense counsel "must be afforded 'broad discretion' in the handling of cases." *Id.* at 325, quoting *People v Lundberg*, 364 Mich 596, 600; 111 NW2d 809 (1961). Therefore, a defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). An appellate court cannot substitute its judgment for that of counsel's in matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). However, this Court must ensure that defense counsel provided the "modicum of representation that is [a defendant's] constitutional right in a criminal prosecution." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). Second, a defendant must show that counsel's unreasonable performance was so prejudicial as to deprive defendant of a fair trial. *Strickland*, 466 US at 692; *Pickens*, 446 Mich at 309. This prong requires a defendant to show that, but for counsel's error, it is reasonably probable that a different result would have been reached, and that the actual result reached was "fundamentally unfair or unreliable." *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

At trial, defense counsel had complainant read into the record several entries from defendant's phone bill, which showed that calls were made from complainant's phone to defendant's phone after the last alleged sexual act. Defense counsel then attempted to have defendant's phone records admitted into evidence. Upon objection, defense counsel withdrew the evidence and did not, thereafter, attempt to have it admitted again.

Following an evidentiary hearing, the trial court found as a matter of law that defense counsel's performance was objectively unreasonable because complainant's credibility was the most important factor in this case and the phone records would have constituted a further attack on her credibility, but that such performance did not amount to sufficient prejudice so as to deny defendant a fair trial.

Defendant asserts that defense counsel's failure to admit his phone bill into evidence was objectively unreasonable, and not a matter of trial strategy, but instead ignorance of the rules of evidence or lack of preparation. Defendant further argues that he was prejudiced by defense counsel's failure in two ways: first, the trial court instructed the jury that only properly admitted evidence may be considered. Defendant argues that the phone records, which were not properly admitted, would likely have discredited complainant's credibility and allegations that defendant forcibly engaged in acts of sexual penetration with her, that she did not call defendant after the final alleged sexual incident, and that she was afraid of him. Second, because the phone records were not admitted, the prosecution was allowed to tell the jury to disregard them and to accuse the defense of fabricating them. Thus, the jury could not consider the phone records, which, in conjunction with other evidence, likely would have discredited the allegations of complainant, and, therefore, led to defendant's acquittal.

While defense counsel's failure to have defendant's phone bill admitted into evidence was based on an erroneous belief that the complainant's testimony alone could lay the foundation for admission of the records and not sound trial strategy, defense counsel mounted and elicited a number of attacks against complainant's credibility, including from complainant's own step-

father and adoptive mother, each of whom testified about a prior false rape accusation made against her step-father. Additionally, complainant's adoptive mother acknowledged that complainant "lies." Moreover, the jury heard the key contents of the phone records when complainant read seven such calls from the phone records into evidence on cross-examination. Finally, the phone records would have served only as additional evidence attacking complainant's credibility, and not as the basis of some separate defense of which defendant was deprived. Therefore, even assuming there was ineffective assistance of counsel, the error was not prejudicial.

Second, even assuming that defense counsel's alleged error was unreasonable and not a matter of trial strategy, defendant's claim of ineffective assistance of counsel still fails because defendant has failed to show that, but for defense counsel's alleged error, he likely would have been acquitted and his conviction was "fundamentally unfair or unreliable." See *Poole*, 218 Mich App at 718.

MCL 750.520d(1)(a) is a strict liability statute, and does not require a showing of force, coercion, or lack of consent. To violate MCL 750.520d(1)(a), a defendant need only engage in sexual penetration with a child between the ages of 13 and 16. Therefore, admission of the phone records into evidence could only have made a difference in defendant's case to the extent that the phone records demonstrated that he and complainant did not have any sexual relationship. However, the mere number of phone contacts between complainant, a 15-year-old-girl, and defendant, a 25-year-old man, could have suggested to a reasonable fact-finder that the relationship between them was more serious than mere friendship, which could serve only to damage defendant's case. The jury's ability to see the phone records, as opposed to merely hear their contents read into evidence by complainant, would not have made a difference in the jury's determination that sexual acts occurred between complainant and defendant.

Additionally, complainant's credibility had been thoroughly impeached by defense counsel. Defendant's phone bill, therefore, would have been merely cumulative evidence attacking complainant's credibility, and defense counsel's failure to present it did not constitute ineffective assistance. See *People v Carbin*, 463 Mich 590, 603-604; 623 NW2d 884 (2001); *People v Bedford*, 78 Mich App 696, 702-703; 260 NW2d 864 (1977). In light of the attacks made upon complainant's credibility and the arguably damaging nature of the phone records, an enhanced attack in the form of phone records would not have led the jury, which heard complainant read key entries from defendant's phone bill into the record on cross-examination, to conclude that there was no sexual relationship between complainant and defendant.

Finally, defendant's argument that he was prejudiced because the trial court instructed the jury not to consider evidence not properly admitted, and because the prosecutor was allowed to tell the jury that they could not consider the phone records and accuse the defense of fabricating defendant's phone bill is unavailing. First, as defendant acknowledged in his brief, the trial court's instructions in this case were proper. Moreover, the content of the phone records supporting defendant's case were read into the record by complainant when defense counsel cross-examined her. Therefore, the jury could consider the credibility of the phone records and their impact on complainant's credibility based on complainant's own testimony. Second, concerning the prosecutor's comments to the jury, the trial judge properly instructed the jurors that "[t]he lawyers statements and arguments . . . are not evidence," and that only properly admitted evidence may be considered. "Jurors are presumed to follow their instructions, and

instructions are presumed to cure most errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), citing *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The prosecutor’s comments were not so severely prejudicial as to not have been cured by the trial court’s instructions because, pursuant to the instructions, the jury was able to disregard the prosecutor’s comments and consider the credibility of defendant’s phone records as testified to by complainant.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello